

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1435

To be argued by
SARAH S. GOLD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1435

UNITED STATES OF AMERICA,

Appellee,

—v.—

LAVANNE ELAINE HAMMOND,

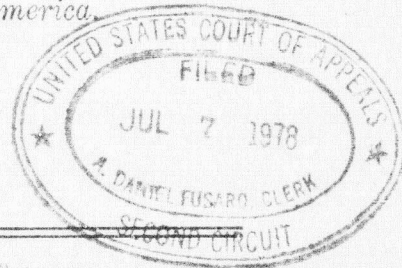
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
The Government's Case	2
A. Synopsis	2
B. The Negotiations	2
C. The Arrests of Hammond and Jones and Search for Hansen	6
The Defense Case	9
ARGUMENT:	
The District Court Was Correct In Denying Hammond's Suppression Motion	10
CONCLUSION	20

TABLE OF CASES

<i>Chimel v. California</i> , 395 U.S. 752 (1969)	11
<i>Coolidge v. New Hampshire</i> , 403 U.S. 443 (1971) .	16, 19
<i>Fisher v. Volz</i> , 496 F.2d 333 (2d Cir. 1974)	12
<i>United States v. Berenguer</i> , 562 F.2d 206 (2d Cir. 1977)	15
<i>United States v. Brown</i> , 467 F.2d 419 (D.C. Cir. 1972)	12
<i>United States v. Cravero</i> , 545 F.2d 406 (5th Cir. 1976), <i>cert. denied</i> , 429 U.S. 1100 (1977) .	12, 13, 19

	PAGE
<i>United States v. Diaz</i> , Dkt. No. 78-1109, slip op. 3675 (2d Cir. June 27, 1978)	17
<i>United States v. Ford</i> , 553 F.2d 146 (D.C. Cir. 1977)	12
<i>United States v. Harper</i> , 550 F.2d 610 (10th Cir.), 98 S. Ct. 128 (1977)	12, 13, 18, 19
<i>United States v. James</i> , 528 F.2d 99 (5th Cir.), <i>cert.</i> <i>denied</i> , 429 U.S. 959 (1976)	12, 16
<i>United States v. McKinney</i> , 379 F.2d 259 (6th Cir. 1967)	12, 13, 19
<i>United States v. Morell</i> , 524 F.2d 550 (2d Cir. 1975)	18
<i>United States v. Reed</i> , Dkt. No. 77-1319 slip op. 2395 (2d Cir. April 11, 1978)	10, 13, 14, 18, 19
<i>United States v. Santana</i> , 427 U.S. 38 (1976) ...	14, 15
<i>United States v. Scafidi</i> , 564 F.2d 633 (1977), <i>cert.</i> <i>denied</i> , 46 U.S.L.W. 3704 (May 15, 1978)	12
<i>United States v. Watson</i> , 423 U.S. 411 (1976)	14
<i>Vale v. Consiana</i> , 399 U.S. 30 (1970)	19

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—v.—

LAVANNE ELAINE HAMMOND,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Lavanne Elaine Hammond appeals from a judgment of conviction entered on September 29, 1977, in the United States District Court for the Southern District of New York, after a four-day jury trial before the Honorable Constance Baker Motley, United States District Judge.

Indictment 77 Cr. 386, filed May 20, 1977, charged Hammond and Millicent Jones with conspiring to distribute and to possess with intent to distribute heroin, in violation of Title 21, United States Code, Section 846.

On September 20, 1977, the morning of trial, Hammond made an oral motion to suppress certain physical evidence seized at the time of her arrest. After an evidentiary hearing was conducted on September 20th and 21st, the motion was denied. Trial commenced on September 26, 1977, and continued until September 29, 1977, when the jury convicted both Hammond and Jones.

On November 15, 1977, Hammond was sentenced to a term of imprisonment of two years and Jones was sentenced to a term of imprisonment of one year and one day. Execution of both sentences was suspended, and the defendants were placed on probation for periods, respectively, of three years and eighteen months.

Statement of Facts

The Government's Case

A. Synopsis

In its direct case, the Government proved by overwhelming evidence, including the testimony of two undercover agents of the Drug Enforcement Administration ("DEA") and lengthy tape recorded conversations, that in April, 1977, Hammond and Jones conspired to possess with intent to distribute and to distribute heroin. The evidence showed that Jones played a principal role in negotiating the sale of one-eighth of a kilogram of heroin to two undercover agents and that Hammond was to be the source of the heroin. The conspiracy ended when DEA agents arrested the defendants without completing the transaction.

B. The Negotiations

On April 14, 1977, Gerald Franciosa, a DEA Special Agent acting in an undercover capacity, was introduced by an informant to the defendant Jones at Jones' apartment on Washington Avenue in the Bronx. (Tr. 27-29).^{*} Prior to the meeting, the informant had recorded two

^{*} "Tr." refers to the trial transcript; "H" refers to the minutes of the suppression hearing; GX refers to Government exhibits; DX refers to defense exhibits; "Op." refers to the District Court's oral opinion on Hammond's suppression motion.

telephone conversations with Jones, during which arrangements were made for the meeting and for Franciosa's purchase of heroin. In these conversations, Jones told the informant that the defendant Hammond would come to the apartment for the money, depart and give the money to her boyfriend (hereinafter "Hansen"),* who would then obtain the heroin. (Tr. 27, 122-23, 208-09; GX 15).

When Franciosa arrived at Jones' apartment, he and Jones discussed the prices she would charge for heroin and cocaine. Jones told Franciosa that one-eighth of a kilogram of heroin would cost \$7,000 and one-eighth of a kilogram of cocaine would cost \$5,500. Franciosa told Jones that h wanted to purchase heroin. Jones said her source would b arriving soon. (Tr. 28-29).

Shortly thereafter, Hammond arrived at Jones' apartment in a rented yellow Ford.** Hammond confirmed that

* Defendant Hammond's boyfriend or husband, as he was alternately referred to during the trial, was identified as Basil Hansen. Hansen, named by the Government as an unindicted co-conspirator (H. 17), was a convicted narcotics dealer, *see United States v. Taylor*, 75 Cr. 1112, who escaped from the Metropolitan Correctional Center on April 11, 1976. At the time of the instant trial, Hansen was a fugitive with outstanding warrants for his federal narcotics conviction, escape and a New York State murder indictment. In February, 1978, Hansen was apprehended. On April 4, 1978, the Honorable Kevin T. Duffy, United States District Judge, sentenced Hansen to a term of imprisonment of 60 years on the narcotics conviction.

During the investigation which led to the arrest of Jones and Hammond, some of the agents in the group investigating the case tentatively identified Basil Hansen from an old photograph. It was not, however, until after April 27, 1977, that the agent in charge of the investigation positively identified Hansen from a surveillance photograph.

** Two surveillance officers, who were stationed on the street outside of Jones' apartment, observed Hammond's arrival. (Tr. 247, 267, 270-71, 273).

Asian white heroin would cost \$7,000 per eighth of a kilogram and told Franciosa she wanted the money in advance. Hammond stated she would then get the heroin from her husband, who was waiting downstairs. Franciosa refused to "front" the money and asked Hammond to bring her husband to the apartment with the heroin. (Tr. 30-31).

Hammond left the apartment and met with co-conspirator Hansen. (Tr. 247-48, 268, 273, 326-27, 330-32, 335). Hammond and Hansen walked out of the area, leaving the yellow Ford rental car on the street. Approximately one-half hour later, Hammond telephoned Jones and told her that Hansen would not come up to the apartment. (Tr. 34).

After the telephone call from Hammond, Jones once again asked Franciosa if he would "front" the money. Franciosa refused and asked Jones to telephone Hammond so that he could speak to Hansen. (Tr. 35). During the course of the evening, Franciosa had two telephone conversations with Hansen, but could not consummate the transaction in view of Hansen's insistence that the \$7,000 be "fronted" to either Hammond or Jones. (Tr. 41-42).*

The next evening, April 15, 1977, Franciosa returned to Jones' apartment. Jones told him the heroin would be brought to the apartment. Once again there were telephone negotiations for one-eighth of a kilogram of

* While Franciosa was in Jones' apartment attempting to conclude the sale, an unidentified person came with a man in a blue Ford rental car and retrieved the yellow Ford rental car left on the street earlier in the evening by Hammond. While the surveillance agents were not able to identify the driver, they did follow the car and its driver to a house on DeReimer Avenue in the Bronx. (Tr. 275-77). Apparently, these persons spotted the surveillance, since the yellow Ford rental was returned to Grand Ford Inc. the following day and a new car rented in its place. (Tr. 275-79, 446-51; GX 6A-B).

heroin, and once again the deal fell through when Franciosa refused to "front" the entire \$7,000. (Tr. 43-46, 249-52, 279-80). On April 18, 1977, Franciosa had a lengthy recorded telephone conversation with Jones in which they discussed how the purchase of heroin would proceed. (Tr. 47-49; GX 1, 1A). Finally, on April 26, 1977, Franciosa agreed, in a telephone conversation with Jones, to "front" the \$7,000. (Tr. 63). The exchange of the heroin and the money was scheduled for the next day.

On April 27, 1977, Franciosa telephoned Jones and told her that he had the \$7,000. Jones told him she would call Hammond to see whether she and Hammond would bring the heroin to Franciosa or whether Franciosa should come to Jones' apartment to get it. (Tr. 63-64; GX 2, 2A). After contacting Hammond, Jones told Franciosa that the heroin would be delivered in the manner previously discussed in their April 18, 1977, telephone conversation; that is, Franciosa would come to Jones' apartment and wait with her children, while Jones took the money and returned with the package of heroin. (Tr. 63-64; GX 1, 1A, 2, 2A).

After the telephone conversation with Jones, Franciosa, together with another undercover agent wearing a kel transmitter, went to Jones' apartment. The agents counted out the \$7,000 and gave it to Jones. Jones then received a telephone call from Hansen. She told Hansen that she had the money and that he could come pick it up. (Tr. 75-77, 255-56; GX 5, 5A-D). Franciosa also spoke to Hansen to reassure him about the deal. While the agents awaited Hansen's arrival, Jones told them that Hammond had taught her how to make money by cutting and wrapping heroin. Jones said that Hammond herself wrapped three kilos of heroin a day. (Tr. 76-79, 257; GX 5, 5A-D). Eventually, Jones received another telephone call from Hansen. After the telephone call,

Jones took the \$7,000, left the apartment, and met with Hansen outside the building. (Tr. 283).^{*} Jones then returned to the apartment with the money, telling the agents that Hansen was going to get the heroin and would call later. (Tr. 81).

Meanwhile, Hansen entered a gypsy cab and was followed across the Bronx by the surveillance cars as well as the helicopter. Despite the extensive surveillance, Hansen evaded the agents. (Tr. 281, 284-85). Some time thereafter, Hansen telephoned Jones and told her that he had spotted police surveillance and the helicopter. Hansen threatened to kill Jones for setting him up. Jones returned the \$7,000 to the agents, who then left the apartment. (Tr. 81-82, 259).

C. The Arrests of Hammond and Jones and Search for Hansen

On May 3, 1977, two surveillance agents saw Hammond enter and exit the DeReimer Avenue house.^{**} They also saw Basil Hansen entering the house.^{***} When they saw Hansen, the agents called for assistance and notified the Federal Bureau of Investigation (FBI). (Tr. 344). When back-up agents arrived, they were deployed both to the rear and to the front of the house. Agents knocked on the door. After approximately five minutes, Hammond

^{*} Jones and Hansen were observed by agents conducting surveillance in four cars and a helicopter. (Tr. 281).

^{**} During this period, Hammond's father was seen leaving the house, as well as two other men—one of whom was a fugitive—who were arrested a few blocks from the house with a loaded gun and \$5,000 in cash. (H. 42-43, 75-76; Tr. 345-46, 351).

^{***} This occasion was the first time since making a positive identification that the agents had seen Hansen. It was only through a surveillance photograph taken on April 27 outside the DeReimer Avenue house that the agent in charge of the investigation became certain of Hansen's identity. (H. 61; Tr. 330-32).

came to the second story window, and then downstairs to open the door. (H. 43-44; Tr. 311-12). The agents told Hammond they were searching for a fugitive and showed her a photograph of Hansen, whom she denied knowing. She then remained in the kitchen area with her son and two agents, while other agents searched the house. The sportcoat which Hansen had been wearing when he entered the house was found in an upstairs bedroom. Inside the coat were a set of keys and a New York State driver's license in the name of Dennis Williams. The driver's license had Hansen's photograph on it. (H. 45; Tr. 353). Hansen was not found.

Hammond was then placed under arrest by Special Agent Greenan for her role in the narcotics conspiracy and advised of her constitutional rights. (H. 46; Tr. 378-81). On the kitchen table, one or two feet away from Hammond, was an open pocketbook. Agent Greenan looked in the pocketbook for a weapon. At that time, he saw a number of leases and a driver's license. Hammond was then questioned about Basil Hansen. She was shown the driver's license which had been found in Hansen's jacket and questioned about the contents of her pocketbook, including a New York State driver's license in the name Yolanda Williams and leases for different apartments in the Bronx under various names. (H. 47-48; Tr. 381-82).^{*} Hammond was then taken to Drug Enforcement Administration headquarters.

While two agents remained inside the house and two remained outside the house awaiting Hansen's possible

^{*} One of the leases found in Hammond's pocketbook was for the DeReimer Avenue house. It was leased under the names Ronald and Elaine Hobson. That lease and the original held by the real estate company were introduced into evidence at trial. The real estate agent identified Hammond as the lessee. (Tr. 439-41; GX 7A-B).

return, other agents left to search for Hansen using the leads found in Hammond's pocketbook. (H. 47-48; 50-51). After some time, the agents on surveillance outside the house observed a Ford rental car occupied by two men coming down DeReimer Avenue.* The car stopped in front of the DeReimer Avenue house. One of the men exited the car, walked to the front gate of the house and stood there motioning upwards. (H. 51-52). One of the agents inside the house saw a person run across the yard. The Ford then left the area. (H. 51-52). The agents at the house then radioed to the agents searching for Hansen and told them to return to the house. (H. 96-97).

When the agents returned to DeReimer Avenue, they discussed the evening's events. Since the prior search of the house for Hansen had uncovered a number of books on carpentry, a lumber receipt, and numerous tools in the basement, Franciosa thought that a secret compartment of some type had been built and that the men in the Ford had returned either for a stash of narcotics or for Hansen himself. (H. 53-55). Since the agents had seen Hansen enter but not leave the house, they decided that Hansen might still be inside. Therefore, the search was renewed. (H. 57-58). Franciosa went upstairs with his gun drawn. In the master bedroom, he saw an open window and, inside the closet, an open trap door with a light shining.** Looking into the opening, Franciosa saw and removed numerous articles of men's clothing, several pieces of identification, boxes of glassine envelopes, measuring spoons and a package of white powder, later found to be a quinine and sugar mixture. (H. 59-60, 93-94, 107-08).

* The car was the same one seen on April 14 by surveillance agents outside Jones' apartment on Washington Avenue. (H. 97).

** Agent Greenan testified that he had not seen a trap door in his search of the bedroom and closet area earlier that evening. (H. 59).

The package of white powder and two photographs of the trapdoor were introduced into evidence at trial. (Tr. 107-08, 433; GX 8, 4A-B).*

After leaving the DeReimer Avenue house, the agents went to Washington Avenue where they arrested Jones. (Tr. 359).

The Defense Case

The defendants sought to prove that the agents, desperate to capture Basil Hansen, invented the narcotics conspiracy case as an afterthought, presumably in an attempt to get Hansen.** In support of this contention, Jones called a DEA agent and an employee from the Metropolitan Correctional Center (MCC) as witnesses. The employee testified that the remand form for Hammond, filled out by the DEA agent who brought Hammond to the MCC to be lodged on the evening of her arrest, indicated that the charge against her was "harboring a fugitive."*** (Tr. 468-69; DX A). The DEA

* The package of quinine and sugar, the photographs, the driver's license and lease found in Hammond's pocketbook were the subjects of Hammond's motion to suppress.

** The defense theory was somewhat difficult to follow, since the defendants advanced two totally inconsistent arguments: First, that the facts as proven in the Government's case were invented by the agents as an afterthought and second, that the facts were all true, but that the conspiracy's objective was a "rip-off" and not a narcotics transfer.

*** Agent Greenan testified that he had arrested Hammond on the charge of conspiracy to violate the federal narcotics laws, that he had so advised her at the time of arrest, and that he had obtained prior authorization from the United States Attorney's office to do so. (Tr. 381, 395-96). The following day, Hammond was advised by an Assistant United States Attorney that she was being charged with engaging in a narcotics conspiracy and a complaint specifying that charge was filed. (Tr. 410-12). Agent

[Footnote continued on following page]

agent testified that on April 20, 1977, he had identified a photograph of Basil Hansen as the man he had seen while on surveillance on April 15, 1977. (Tr. 438-43). From this testimony, the defendants argued that if the agents' testimony were true, Hansen could have and should have been arrested at least by April 27th.

ARGUMENT

The District Court Was Correct In Denying Hammond's Suppression Motion.

Hammond's sole contention on appeal is that the District Court erred in denying her motion to suppress items of evidence seized from her home at the time of her arrest and shortly thereafter. Relying principally on this Court's recent decision in *United States v. Reed*, Dkt. No. 77-1319, slip op. 2395 (2d Cir. April 11, 1978), Hammond contends that her arrest in her home was unlawful, and that, therefore, the items seized from her DeReimer Avenue home should have been suppressed. Those items included a driver's license and real estate lease found in a search of Hammond's open pocketbook incident to her arrest, as well as narcotics paraphernalia seized in plain view while the agents were searching Hammond's home for the fugitive Hansen.* As to the latter seizure, Hammond

Greenan further testified that the agent who had taken Hammond to the MCC to be lodged was not a member of the group investigating the narcotics case, was not familiar with the narcotics case, was not present when Hammond was placed under arrest, and had been called in specifically to aid in the arrest of the fugitive Hansen. Thus, it was clear that the agent who lodged Hammond at the MCC was familiar only with DEA's efforts to locate Hansen and had, therefore, assumed that Hammond was being charged with harboring the fugitive Hansen.

* This evidence included a package of white powder, later found to be a quinine and sugar mixture, boxes of glassine envelopes and measuring spoons. The powder and two photographs of the trap door were offered into evidence at trial. (GX 8, 4A-B).

also urges that the evidence should have been suppressed because there were no "exigent circumstances necessitating the search for Hansen" (Br. 20) and because, even if properly seized, the evidence was not admissible against Hammond. Each of Hammond's contentions, however, ignores the critical fact that the DEA agents who arrested Hammond and searched the premises were lawfully in her home to execute an arrest warrant for a fugitive they had seen enter the house. Accordingly, Hammond's arrest, which concededly was based upon probable cause (Br. 14), and the search incident to it * were lawful. Similarly, there was no impropriety in the search of the house for the fugitive Basil Hansen and the resulting seizure of evidence in "plain view."

On May 3, 1977, two DEA agents maintaining surveillance of Hammond's home saw Basil Hansen, a fugitive for whom they had an arrest warrant, enter Hammond's DeReimer Avenue home. The surveillance agents immediately called for help. After other agents arrived, members of the team knocked on the door to Hammond's home which, after several minutes, was opened by Hammond. The agents identified themselves and told Hammond they were looking for Hansen, whom she denied knowing. They then unsuccessfully searched the house for Hansen. After the search, Hammond was arrested, and her open pocketbook, which was on a table one or two feet away from her, was searched for a weapon. Hammond's pre-trial motion to suppress evidence taken from her pocketbook was denied.

As Judge Motley properly recognized, the agents were lawfully in Hammond's premises to execute the arrest

* Trial counsel conceded at the suppression hearing that the evidence taken from Hammond's purse was lawfully seized as incident to her arrest, if the arrest was proper. (H. 131, 136). No contrary position is taken on this appeal. See e.g., *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

warrant for Hansen. A search warrant is not necessary to execute an arrest warrant on the premises of a third party. See *United States v. Harper*, 550 F.2d 610 (10th Cir.), 98 S. Ct. 128 (1977); *United States v. Cravero*, 545 F.2d 406, 420-21 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); *United States v. James*, 528 F.2d 999, 1017 (5th Cir.), *cert. denied*, 429 U.S. 959 (1976); *United States v. Brown*, 467 F.2d 419, 423 (D.C. Cir. 1972); *United States v. McKinney*, 379 F.2d 259 (6th Cir. 1967); *Cf. Fisher v. Volz*, 496 F.2d 333 (3d Cir. 1974).^{*} The officers need only have a reasonable belief that the person named in the warrant is on the premises searched. See *e.g.*, *United States v. Harper*, *supra*, 550 F.2d at 613; *United States v. Cravero*, *supra*, 545 F.2d at 421. Here, in a finding not challenged by Hammond on this appeal, the District Court held that the agents had probable cause to believe that fugitive Basil Hansen, for whom they had an arrest warrant, was in Hammond's house. (Op. 3). Therefore, as the court below held, the agents' entry onto the premises to arrest Hansen

^{*} Hammond cites *United States v. Ford*, 553 F.2d 146 (D.C. Cir. 1977), a case involving electronic surveillance, as support for the proposition that both probable cause and exigent circumstances were required to justify the agents' entry into Hammond's home. (Br. 17). In *Ford*, the court held that entries into private premises to install, maintain and remove electronic devices are invasions of privacy distinct from any actual eavesdropping and therefore require separate consideration from the Title III order permitting interception of oral communications. 553 F.2d at 170. That is not the law in this Circuit. See *United States v. Scafidi*, 564 F.2d 633 (1977), *cert. denied*, 46 U.S.L.W. 3704 (May 15, 1978). Even in *Ford*, however, the Court specifically declined to analogize the wiretap installation question presented by that case to an entry to execute an arrest warrant. In distinguishing the arrest cases, the Court noted that entries to execute arrest warrants were governed by different considerations in that "the very involvement of arrest provides some urgency." 553 F.2d at 159 n.45.

was lawful.* Once lawfully on the premises for that purpose,** it was proper for the agents to arrest Hammond, whom they had probable cause to believe had conspired with Jones and Hansen to sell an undercover agent one-eighth of a kilogram of heroin.*** See, e.g., *United States v. Harper, supra*; *United States v. Cravero, supra*; *United States v. McKinney*, 379 F.2d 259, 262 (6th Cir. 1967).

Nothing in *United States v. Reed, supra*, relied upon by Hammond, is to the contrary. Indeed, careful analysis of *Reed* completely undermines the position advanced by Hammond on this appeal. In *Reed*, this Court held that

"in the absence of a warrant to arrest a suspect at home, and in the absence of exigent circum-

* See Rule 4(d)(2), Fed. R. Crim. P., which provides, in pertinent part:

"The warrant may be executed at any place within the jurisdiction of the United States."

** It is worth noting that Hammond does not claim that the agents used the warrant for Hansen as a subterfuge to enter her home and arrest her. Thus, Hammond states:

"[T]he facts show that the agents surveilling the building were more concerned with Hansen the fugitive for whom they had a warrant, than Hammond. And while he too was seen entering the house in the afternoon, he was not found there. Her arrest appears to have been an afterthought and may have mistakenly been originally for harboring a fugitive." (Br. at 14).

Hammond's sole challenge to the agents' actions in attempting to arrest Hansen is her claim that Hansen had been under surveillance "for some time prior to May 3, 1977," the date of Hammond's arrest. (Br. at 6). The significance attributed to the delay by Hammond is not readily apparent. In any event, the man with Hansen during the narcotics negotiations was not positively identified as Hansen until April 27, 1977. See p. 6, n., *supra*.

*** Hammond concedes there was probable cause for her arrest, (Br. 14) and does not challenge the agents' statutory authority to make a felony arrest without a warrant.

stances, federal law enforcement officers are prohibited by the Fourth Amendment from entering the home of a suspect to effect a felony arrest for which they otherwise have both statutory authority and probable cause." (emphasis added).

United States v. Reed, *supra*, slip op. at 2417. In *Reed*, DEA agents arrested the defendant Nancy Reed in her apartment without an arrest warrant, two and one-half months after their investigation ended. This Court found Reed's arrest unlawful because it had been effected in her home where she was entitled to a "reasonable expectation of privacy." The Court concluded that

"an invasion of the sanctity of the home . . . is simply too substantial an invasion to allow without a warrant . . ."

United States v. Reed, *supra*, slip op. at 2415.

It is clear from the rationale of *Reed* that the distinction set forth in that case between warrantless arrests in the home and warrantless arrests in public places was based on the Court's conclusion that the Fourth Amendment was violated not by the warrantless arrest itself but rather by the invasion into the home without a warrant. (Slip op. 2414-15). Compare *United States v. Santana*, 427 U.S. 38 (1976) and *United States v. Watson*, 423 U.S. 411 (1976). In the instant case, however, the agents had an arrest warrant for Basil Hansen, and probable cause to believe that Hansen was in the DeReimer Avenue premises. Accordingly, under settled Fourth Amendment principles, see p. 12, *supra*, their entry into Hammond's home to execute the warrant was reasonable. Hammond's subsequent arrest, based upon probable cause, caused no further intrusion on any of the Fourth Amendment interests protected by *Reed*. Rather, given the agents' lawful presence on her premises and the consequent dissipation of any "reasonable expect-

tation of privacy," her arrest was the constitutional equivalent of an arrest on a public street or in a public place. See *United States v. Santana, supra* *. Therefore, the evidence found in the search of Hammond's open pocketbook incident to her lawful arrest was properly admitted into evidence.

Hammond's second contention, that the narcotics paraphernalia seized by the agents during their search for Hansen should have been suppressed, is equally meritless. In *United States v. Berenguer*, 562 F.2d 206, 210 (2d Cir. 1977), this Court noted that:

"[t]he plain view doctrine for warrantless searches and seizures is subject to three express requirements: 1) the agents must be lawfully on the premises; 2) the discovery must be inadvertent and 3) its incriminating nature must be immediately apparent."

* Obviously, having failed in their attempt to arrest Hansen, the agents were not required to leave the house and obtain a separate warrant for Hammond in order to justify her arrest. See p. 13, *supra*. Indeed, even Hammond does not suggest that the Fourth Amendment required such an elevation of form over substance. Moreover, assuming *arguendo* that such a procedure was required in the absence of exigent circumstances, the agents' failure to obtain a second arrest warrant in this case was clearly justified. Thus, members of the DEA team had seen Hammond in Hansen's company during the negotiations for the one-eighth of a kilogram of heroin. They also had seen Hansen enter Hammond's home. Having failed to locate Hansen, the agents could not chance leaving Hammond alone at home, thereby risking the possibility that Hammond would warn Hansen that the DEA agents were on his trail. The existence of probable cause for her arrest coupled with the urgency of locating Hansen justified their actions in arresting Hammond without further delay.

See Coolidge v. New Hampshire, 403 U.S. 443 (1971); *United States v. James*, 528 F.2d 999, 1017, *reh. denied*, 532 F.2d 1054 (5th Cir. 1976). Judged by this three-pronged test, the evidence discovered by the DEA agents during their search of Hammond's home for Hansen clearly was properly seized and admitted at trial.

First, as discussed above, the agents initially were lawfully on the premises to execute the arrest warrant for Hansen. Although the agents had seen Hansen enter the house and previously had seen Hansen and Hammond together, Hammond, when confronted with a photograph of Hansen, denied knowing him. Therefore, the agents proceeded to search the house for Hansen. During the course of the search, they found the sportcoat Hansen had been wearing when he entered the house in an upstairs bedroom. They did not, however, find Hansen.

Immediately after Hammond's arrest, several members of the DEA team left Hammond's home to search for Hansen. However, in view of the fact that Hansen had been seen entering the house but had not been seen leaving it, two agents remained inside the home and two remained outside on the chance that Hansen would reappear.

While the agents were maintaining surveillance at Hammond's home, a Ford rental car stopped in front of the house.* A man exited the car and approached the house, motioning upwards. Another man ran across the yard. After this activity, the Ford left the area and the agents maintaining surveillance requested by radio that the other members of the team return to the house.

* Ford rental cars had figured prominently in the narcotics negotiations in which Hansen, Jones and Hammond had been involved. See p. 4, *supra*.

After the agents regrouped, they discussed the evening's events. Recalling that carpentry books, a lumber receipt and tools had been found in the basement during the prior search, and noting both the activity of the Ford rental car and that Hansen had not been seen leaving the premises, the agents concluded that Hansen was still hiding inside the house. They therefore renewed their search. Based on these facts, Judge Motley, in a finding that is not challenged on appeal, concluded that the agents:

"had probable cause to believe that the fugitive Hansen was still in the house because of the activities which they saw involving the blue car which had circled the block, stopped in front of the house and so forth . . . having this probable cause and an unexecuted search [sic] warrant, there was no necessity for a search warrant of the house in addition." (Op. 3).

Thus, the agents acted lawfully in re-entering the house and resuming the search for Hansen.

In the course of this second search * of the house for Hansen, one of the agents looked into an open trap door

* While we have analyzed the agents' actions by referring to two searches for Hansen, it is not altogether clear that the "second" search was, in fact, separate from the first in anything other than the temporal sense. Thus, between the searches, agents were continually in the house. Judge Motley found that the agents who remained at Hammond's home had a legal right to remain there in view of the fact that there was "probable cause to believe that Hansen was still in the house, since they did not see him leave the premises." (Op. 4). See *United States v. Diaz*, Dkt. No. 78-1109, slip op. 3675, 3679-80 (2d Cir. June 27, 1973). Hammond does not challenge that finding. Upon this view of the evidence, the later search of the house was merely a more thorough continuation of the earlier search, undertaken when the agents realized they might have overlooked a secret hiding place.

in the upstairs bedroom closet. When he looked inside the opening, he saw the challenged evidence. Thus, the undisputed facts found by Judge Motley after the suppression hearing clearly compel the conclusion that the agent who discovered the evidence was both lawfully on the premises and lawfully in the place where the evidence came into his view.

Second, the discovery of the narcotics paraphernalia was totally inadvertent. The arrest warrant for Hansen "was the genesis and the impetus for the initial entry and search of the residence." *United States v. Harper, supra*, 550 F.2d at 613. It was in the course of the agent's effort to locate and arrest Hansen, and not during a search for evidence, that the narcotics paraphernalia was inadvertently discovered. See e.g., *United States v. Morell*, 524 F.2d 550, 555-56 (2d Cir. 1975).

Finally, there can be no dispute in this case that the incriminating nature of the evidence was immediately apparent to the experienced undercover agent who discovered it. The evidence in plain view consisted of glassine envelopes, measuring spoons and a package of white powder; in short, the basic tools of the narcotics trade, which had been secreted behind a false back wall of the bedroom closet.

Hammond argues that the evidence seized during the search for Hansen should have been suppressed because there were no exigent circumstances necessitating the search for Hansen.* The presence of exigent circum-

* Hammond also argues that the evidence seized during the second search for Hansen should have been excluded on the basis of *United States v. Reed, supra*. Since the admissibility of this evidence was not dependent on the lawfulness of Hammond's earlier arrest, and the agents had an arrest warrant for Hansen, the argument must fail. In any event, as shown above, Hammond's arrest was lawful.

stances, however, is one of a number of exceptions to the warrant requirement justifying warrantless intrusions, see e.g., *Collidge v. New Hampshire*, *supra*; *Vale v. Louisiana*, 399 U.S. 30 (1970), and is not required for lawful intrusions based upon an arrest warrant. See e.g., *United States v. Reed*, *supra*, slip op. at 2404 (warrantless felony arrests unconstitutional "in the absence of exigent circumstances"); *United States v. Cravero*, *supra*, 545 F.2d at 421.

Hammond's further argument that the evidence found during the second search, even if properly seized, was not admissible against her is frivolous. Since the agents were lawfully on the premises and properly seized the evidence, there is no basis whatever for application of the exclusionary rule to suppress that evidence. See, e.g., *United States v. Harper*, *supra*, 550 F.2d at 613. Nor does Hammond suggest any such basis.* The evidence seized was connected to the defendant at trial and, as such, was relevant. Nor was there any constitutional or statutory bar to its admission. As such, the District Court did not err in admitting the evidence.

* Hammond does refer the court to dicta contained in a footnote in *United States v. McKinney*, *supra*. (Br. 18-19). The basis of the District Court's unreported decision is unclear from the cited footnote. It is clear, however, that evidence properly seized on third party premises during a search for a fugitive based upon an arrest warrant is admissible against that third party. See e.g., *United States v. Harper*, *supra*.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Of Counsel.*

AFFIDAVIT OF MAILING

State of New York)

County of New York)

ss.:

SARAH S GOLD being duly sworn,
deposes and says that *She* is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the *7* day of *July*, 197*8*
he served a copy of the within
2 copies
by placing the same in a properly postpaid franked
envelope addressed:

*Richard E. Rieder, Esq.
161 East 42nd Street
New York New York 10017*

And deponent further says that *She* sealed the said
envelope and placed the same in the mail box for mailing
at One St. Andrew's Plaza, Borough of Manhattan, City of
New York.

Sarah S Gold

Sworn to before me this

7th day of *July*, 197*8*

Iola Krezic

IOLA KREZIC
Notary Public, State of New York
No. 52-4131670
Qualified in Queens County
Term Expires March 30, 197*9*

2